

~~UNITED STATES~~
POSTAL RATE COMMISSION

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In the Matter of:

EXPERIMENTAL PRESORTED PRIORITY
MAIL RATE CATEGORIES

)
)
) Docket No. MC2001-1
)

PREHEARING CONFERENCE

Volume: 1
Pages: 1 through 21
Place: Washington, D.C.
Date: April 6, 2001

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~~UNITED STATES~~ POSTAL RATE COMMISSION

In the Matter of:)
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EXPERIMENTAL PRESORTED PRIOR) Docket No. MC2001-1
MAIL RATE CATEGORIES)

Hearing Room
Postal Rate Commission
1333 H Street, N.W.
Washington, D.C.

Volume 1
Friday, April 6, 2001

The above-entitled matter came on for prehearing
conference, pursuant to notice, at 10:04 a.m.

BEFORE:

HON. GEORGE A. OMAS, VICE-CHAIRMAN, PRESIDING
HON. RUTH Y. GOLDWAY, COMMISSIONER
HON. W.H. "TREY" LEBLANC, COMMISSIONER
HON. DANA B. "DANNY" COVINGTON, COMMISSIONER

APPEARANCES:

On behalf of the United States Postal Service:

MICHAEL TIDWELL, Esquire
ERIC KOETTING, Esquire
United States Postal Service
475 L'Enfant Plaza, Southwest
Washington, D.C. 20260-1137

APPEARANCES: (cont'd.)

On behalf of Association of Priority Mail Users, Inc.:

JOHN S. MILES, Esquire
WILLIAM J. OLSON, Esquire
William J. Olson, P.C.
8180 Greensboro Drive, Suite 1070
McLean, Virginia 22102-3860
(703) 356-5070

On behalf of Douglas F. Carlson:

(No appearance.)

On behalf of R.R. Donnelley and Sons Company:

FRANK WIGGINS, Esquire

On behalf of Magazine Publishers of America:

JAMES PIERCE MYERS, Esquire
James Pierce Myers
Attorney-At-Law
1617 Courtland Road
Alexandria, Virginia 22306
(703) 660-1002

On behalf of National Newspaper Association:

TONDA F. RUSH, Esquire
King & Ballon
P.O. Box 50301
Arlington, Virginia 22205
(703) 241-1480

On behalf of National Postal Mail Handlers Union:

(No appearance.)

Heritage Reporting Corporation
(202) 628-4888

APPEARANCES: (cont'd.)

On behalf of Newspaper Association of America:

WILLIAM B. BAKER, Esquire
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7255

On behalf of the Office of the Consumer Advocate:

EMMETT RAND COSTICH, II, Esquire
TED P. GERARDEN, Esquire
Office of the Consumer Advocate
Postal Rate Commission
1333 H Street, N.W., Suite 300
Washington, D.C. 20268-0001
(202) 789-6833

On behalf of Parcel Shippers Association:

(No appearance.)

On behalf of David B. Popkin:

(No appearance.)

On behalf of United Parcel Service:

JOHN E. MCKEEVER, Esquire
PHILLIP E. WILSON, JR., Esquire
Piper, Marbury, Rudnick & Wolfe, L.L.P.
3400 Two Logan Square
18th and Arch Streets
Philadelphia, Pennsylvania 19103
(215) 656-3310

P R O C E E D I N G S

(10:04 a.m.)

PRESIDING OFFICER OMAS: Good morning. I think I better put on my glasses. Welcome to the prehearing conference in Docket No. MC2001-1, the Experimental Presorted Priority Mail Rate Categories.

As noted in the Commission Order 1306, this case involves the Service's request, which was filed March 7, 2001, for a set of three experimental discounts for certain ~~P~~riority ~~M~~ail, presorted ~~P~~riority ~~M~~ail.

Briefly, the proposed per piece discounts for qualifying presorted priority mail are 12 cents for an area distribution center, 16 cents to three digit and 25 cents for five digits. Mailings would have to consist of at least 300 presorted priority mail pieces or weigh at least 500 pounds and meet other Postal Service requirements. The term of the experiment would be three years.

First I would like to discuss the broadcast and transcription of this case. The Commission had intended to continue its practice of offering live audio broadcasting via our website, which is a service, as you all know, that began during the recent rate case. Unfortunately, we are having technical difficulties today, and we are unable to provide the audio.

A written transcript will be available for those

1 who are interested in ordering one. Heritage Reporting
2 Corporation is providing transcription service for us today.
3 Heritage has placed two standard forms on small tables
4 located at the front of this room over to the left. One is
5 an appearance form. The other is a transcript order form.
6 Please fill out one or both forms as appropriate and leave
7 them with the reporter.

8 Questions about transcript delivery and payment
9 terms should be directed to the reporting company.
10 Heritage's telephone number for reference is (202) 628-4888.

11 Before proceeding to more substantive matters, I
12 will ask counsel to identify themselves for the record.

13 United Parcel Service?

14 MR. MCKEEVER: Good morning, Commissioner Omas.
15 John McKeever for United Parcel Service.

16 PRESIDING OFFICER OMAS: Thank you.

17 Association of Priority Mail Users, Inc.?

18 MR. OLSON: Mr. Chairman, William Olson, and also
19 with me is John Miles of our firm representing APMU.

20 PRESIDING OFFICER OMAS: Thank you.

21 Douglas F. Carlson?

22 (No response.)

23 PRESIDING OFFICER OMAS: R.R. Donnelley and Sons
24 Company?

25 MR. WIGGINS: Frank Wiggins for R.R. Donnelley and
Heritage Reporting Corporation
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1 Sons Company.

2 PRESIDING OFFICER OMAS: Magazine Publishers of
3 America?

4 MR. MYERS: Good morning. Pierce Myers for MPA.
5 MPA has filed as a limited participant.

6 PRESIDING OFFICER OMAS: Thank you.
7 National Postal Mail Handlers Union?

8 (No response.)

9 PRESIDING OFFICER OMAS: International Newspaper
10 Association?

11 MS. RUSH: Good morning, Mr. Chairman. Tonda Rush
12 representing NNA.

13 PRESIDING OFFICER OMAS: Thank you.
14 The Newspaper Association of America?

15 MR. BAKER: Good morning, Mr. Chairman. Bill
16 Baker on behalf of the NAA.

17 PRESIDING OFFICER OMAS: Office of the Consumer
18 Advocate?

19 MR. COSTICH: Thank you, Mr. Chairman. Rand
20 Costich on behalf of the OCA, and with me is Ted Gerarden,
21 director of the office.

22 PRESIDING OFFICER OMAS: Parcel Shippers
23 Association?

24 (No response.)

25 PRESIDING OFFICER OMAS: David B. Popkin?

1 (No response.)

2 PRESIDING OFFICER OMAS: United Parcel Service?
3 We've already done you. Why are you down there twice? Very
4 enthusiastic.

5 United States Postal Service?

6 MR. TIDWELL: Good morning, Commissioner Omas.
7 Michael Tidwell on behalf of the United States Postal
8 Service, accompanied by Eric Koetting doing as good an
9 impersonation of Rick Cooper as possible.

10 PRESIDING OFFICER OMAS: Thank you.

11 Is there anyone else?

12 (No response.)

13 PRESIDING OFFICER OMAS: Okay. Let's proceed to a
14 very brief review of the legal status of this case. As all
15 of you are aware, Order No. 1306 stated that the Commission
16 had preliminarily captioned this case as an experiment in
17 line with the Service's request. However, the term or
18 designation experiment is a term of art in the Commission's
19 rules, as are variations thereon, such as experimental. The
20 Commission has not yet determined whether the Commission
21 Rule 67 through 67(d) will apply in this case.

22 As indicated in the rules, experimental status, if
23 found appropriate, entails several key distinctions from
24 other types of cases in that the decisional time frame is
25 considerably shorter than a traditional rate case. All

1 necessary steps, including issuance of a decision, must be
2 completed within 150 days of either the filing date or
3 approval of the experimental status, whichever is the
4 latter.

5 The Commission has authorized discovery to proceed
6 as a matter of convenience to all of you. It does not
7 shortcut a separate and independent determination regarding
8 the appropriateness of proceedings under the experimental
9 rules.

10 With that clarification, I would like to take up
11 the Service's motion for waiver of certain filing
12 requirements. As contemplated by the rules, the Postal
13 Service has requested that it be allowed to forego filing
14 certain data and information.

15 Does counsel for any participant require
16 ^{Clarification}~~classification~~ of either the grounds for the Postal Service
17 motion or for any other responses?

18 (No response.)

19 PRESIDING OFFICER OMAS: There being none,
20 therefore a ruling will be issued on this matter in the near
21 future.

22 Next, let us turn to whether the proposal should
23 be heard under Rule 67, which the Service requested in its
24 initial filing. This request has been directly challenged
25 in a motion filed by the United Parcel Service on April 3.

1 Under our rules, all participants have the
2 opportunity to respond to this motion in writing. The
3 deadline for those responses is April 10. However, if any
4 counsel wishes they can take this opportunity to comment.

5 PRESIDING OFFICER OMAS: Does UPS have a response?

6 MR. MCKEEVER: No, Commissioner Omas. There is
7 one sentence I might say. I don't believe we did address
8 this in the motion, but since filing the motion we do note
9 it is curious that looking at the proposed data collection
10 plan there would be apparently no significant data
11 collection for the first year or year and a half of an
12 experiment.

13 That does not seem to be characteristic of
14 experiments to us, but other than that we have no additional
15 comments other than what is reflected in our motion.

16 PRESIDING OFFICER OMAS: Thank you, Mr. McKeever.

17 Any others?

18 MR. TIDWELL: Commissioner Omas, the Postal
19 Service just wanted to note for the record that it is our
20 intention to respond to the UPS motion on the 10th.

21 PRESIDING OFFICER OMAS: Thank you.

22 In accordance with our rules, no final
23 determination on experimental status will be made until
24 there has been an opportunity to consider the Postal
25 Service's formal written response to the United Parcel

1 Service. I intend to issue a ruling promptly after those
2 pleadings are submitted.

3 Another item on the agenda is the need for
4 hearings. Two participants, United Parcel Service and the
5 Parcel Shippers Association, have requested hearings in
6 their notice of intervention. However, OCA has suggested
7 that the Commission consider employing a procedure that it
8 has never tried before; accelerating the hearing process by
9 dispensing with oral cross-examination of witnesses.

10 Mr. Gerarden, would you elaborate on how this
11 procedure might work?

12 MR. GERARDEN: Certainly. Let me start out by
13 saying that the OCA suggestion is made in the context of
14 this case. It is not a suggestion that the Commission
15 should change its hearing practices generally and certainly
16 not a suggestion that the Commission should change its
17 ~~approval~~ ^{approach} in omnibus rate cases.

18 The suggestion was made in light of the fact that
19 by all published accounts the Commission will be occupied
20 later this year with another omnibus rate case with an eye
21 toward how the Commission could most expeditiously proceed
22 in this proceeding, knowing that there is significant drain
23 on resources for all participants, including the Commission,
24 coming with another omnibus rate case.

25 The Commission is under an obligation to provide

1 an opportunity for a hearing on the record under Sections
2 556 and 557 of the Administrative Procedure Act. There is,
3 however, no magic to the phrase "on the record." The Courts
4 have made it clear that absent specific Congressional intent
5 to the contrary, the decision on whether to use the formal
6 hearing process rests on the substantive character of the
7 proceedings involved.

8 Now, under the Administrative Procedure Act,
9 Section 554 of that Act applies to every case of
10 adjudication required by statute to be determined on the
11 record after opportunity for an agency hearing. That's in
12 Section 554(a). The essentials that are required to be
13 provided are notice and opportunity to submit facts and
14 argument and to receive evidence.

15 Section 556, which this Commission is obligated to
16 apply by its statute, requires that there be the taking of
17 evidence. Section 556 of the APA does not specifically
18 require oral hearings or cross-examination. There does need
19 to be a formal hearing, but a record, a decisional record,
20 may be compiled in a formal hearing proceeding without there
21 being an oral hearing.

22 That's the distinction that I draw in making the
23 suggestion that this case may be one in which the Commission
24 could consider a paper hearing process as adequate for full
25 development of a record, but an opportunity to shorten what

1 would otherwise be a longer proceeding.

2 The essential requirement of the Administrative
3 Procedure Act is that the procedures adopted promote full
4 and true disclosure of the facts. Section 556(d) of the
5 Administrative Procedure Act provides that a party is
6 entitled to present its case by oral or documentary
7 evidence, to submit rebuttal evidence and to conduct such
8 cross-examination as may be required for a full and true
9 disclosure of the facts.

10 The key is that there is no requirement that it be
11 oral cross-examination. This agency, of course, has adopted
12 procedures in which written interrogatories and responses
13 thereto become cross-examination, the designated cross-
14 examination process.

15 Now, in looking at the practice of various
16 agencies there certainly has been a trend away from a trial
17 type oral hearing to a more paper based hearing. That
18 certainly has been the case, for instance, at the Nuclear
19 Regulatory Commission, which is required to grant a hearing
20 in its licensing proceedings, and its early practice was to
21 use trial type hearings with extensive oral cross-
22 examination, but the agency has shifted away from that
23 towards more paper hearings, and that has been approved by
24 the Court.

25 The same is true for the Federal Energy Regulatory

1 Commission, which used to hold adjudicatory trial type
2 hearings over virtually all proceedings, but in the 1980s no
3 longer did so for certificate cases and more recently has
4 been resolving rate case issues without oral hearings.

5 Perhaps the best example of an agency that has
6 embraced the paper process is the Surface Transportation
7 Board, the remnant of the ICC. The ICC used to be the
8 premier hearing agency of the government. The ~~committee~~ ^{commission}
9 evolved its procedures to abandon the use of oral hearings
10 and under what are called modified procedures under the STB
11 rules in 49 CFR uses paper submissions, what are called
12 verified statements in that practice, the equivalent to
13 written testimony, to develop a record when substantially
14 all material issues of fact can be resolved through the
15 submission of written statements.

16 With that background provided for the OCA's
17 suggestion, the reason the OCA suggested that the Commission
18 consider this is that regardless of whether experimental
19 procedures are adopted in this case I think that the case is
20 one in which expedition should be provided, and the OCA
21 stands ready to assist in that regard.

22 To that end, the OCA has taken the Commission up
23 on its invitation and has submitted discovery to the Postal
24 Service. It has received one set of answers. The OCA
25 submitted some follow up discovery yesterday. We want to

1 move quickly and be in a position to respond to any schedule
2 that the Commission may set.

3 If the Commission determines that it can omit an
4 oral hearing phase, the Commission can adopt a more rapid
5 set of dates for the submission of discovery, for the
6 submission of opposing evidence by other parties, rebuttal
7 evidence by the Postal Service and the submission of the
8 written cross-examination to develop the complete hearing
9 record.

10 Generally the Courts have been supportive of paper
11 hearing procedures except in instances where the credibility
12 of witnesses is a factor. I hesitate to say that that would
13 not be likely ever in a Postal case, but it does seem
14 unlikely in this case that credibility of witnesses would be
15 an important consideration.

16 In making this suggestion, I am cognizant of the
17 fact that the Commission would, of course, have to be open
18 to any party making a showing that oral cross-examination is
19 needed to resolve an issue of fact. Material fact. The
20 Courts have been clear on that also.

21 If such a circumstance were to develop, the
22 Commission may have to consider seriously whether an oral
23 hearing is needed, but it seems at the outset that this is
24 the type of case that is amenable to the adoption of a paper
25 hearing process to shorten the schedule and permit the

1 Commission to issue a decision in an expedited fashion
2 whether the 150 day deadline of the experimental rules is
3 applicable or not.

4 I think it would serve all of the parties well to
5 have this case well underway before our resources have to
6 turn to the coming omnibus rate case.

7 PRESIDING OFFICER OMAS: Thank you, Mr. Gerarden.

8 Would anyone else like to comment on OCA's
9 suggestions? Mr. McKeever?

10 MR. MCKEEVER: Mr. Chairman, while the OCA's
11 approach is novel and might have merit if all parties were
12 to agree that oral cross-examination were not necessary, we
13 would submit that oral cross-examination is the very essence
14 of hearings and is particularly important where expert
15 testimony is involved.

16 Credibility is more than is the witness telling
17 the truth. It's also how knowledgeable is the witness and
18 how persuasive is he in putting forth and defending expert
19 opinions. That's credibility in a broader sense. We do
20 think that that's always an important issue and has served
21 the Commission well in prior proceedings.

22 Obviously if no party wishes to have a hearing
23 that is a different story, and the Commission's procedures
24 even in a normal case provide for that opportunity. The
25 parties have to state ahead of time whether they do wish to

1 conduct oral cross-examination of a witness, and there have
2 been many cases where no party has wished to orally cross-
3 examine a witness. Therefore, the testimony went in without
4 any cross-examination, sometimes without even the witness'
5 appearance, but rather with a declaration appended to the
6 testimony.

7 The Commission already has procedures to shortcut
8 the hearing process where cross-examination is not
9 necessary. However, to come out with any ruling early on in
10 the case, especially this early in a case, that indicates
11 that cross-examination is not necessary we suggest would be
12 rushing to pre-judgement on that issue.

13 The suggestion that maybe discovery, for example,
14 could be truncated and conducted more quickly in the absence
15 of or in a schedule that did not provide for cross-
16 examination we think is the reverse. If you're not going to
17 have oral cross it's all the more important to have ample
18 discovery so that you can have the record fully developed.

19 Be that as it may, unless all parties agree that
20 cross-examination is not essential we believe that it is an
21 important aspect to these proceedings. That again does not
22 mean that there necessarily need be cross-examination in
23 this case or in any other case if after discovery the
24 parties determine that they do not need cross-examination
25 and it does not appear to be necessary.

1 We would wish an opportunity to be heard by filing
2 some comments with the Commission in the event the
3 Commission would seriously entertain at this juncture in the
4 case a schedule under which there would be no provision for
5 oral cross-examination.

6 PRESIDING OFFICER OMAS: Thank you, Mr. McKeever.
7 Is there anyone else? Mr. Tidwell?

8 MR. TIDWELL: The Postal Service would observe
9 that there has been some success achieved in some of the
10 experimental cases that have been heard by the Commission
11 over the last few years in getting to a resolution without
12 the need for oral cross-examination.

13 I think in each instance it's been a matter of the
14 unique circumstances of each case, and it's been a result of
15 the parties being very diligent about pursuit of discovery
16 in those cases and the Postal Service's willingness to work
17 formally and informally with the parties to resolve question
18 that they may have.

19 The Postal Service intends in this proceeding to
20 be as responsive as it can be to formal discovery requests,
21 and it was our intention to announce today that we would
22 like to convene an informal proceeding, an off-the-record
23 proceeding, among the parties to see if there are issues
24 that can be clarified informally.

25 I'd like the opportunity to confer with all

1 counsel after today's proceeding to see when we might be
2 able to resolve on a mutually convenient date for such a
3 meeting.

4 PRESIDING OFFICER OMAS: Thank you, Mr. Tidwell.

5 Mr. Gerarden, is your suggestion primarily
6 intended to make the Commission proceedings take less time
7 through having shorter hearings or to save time?

8 MR. GERARDEN: It's primarily intended to offer
9 the opportunity to have an overall shortened hearing
10 process. It's not intended to truncate the rights of any
11 party to submit testimony for the record. It's not intended
12 to try to avoid the Commission having the fullest record
13 possible.

14 Having observed the success other agencies have
15 had in certain proceedings proceeding on a paper basis and
16 being able to more efficiently render a decision, still
17 enjoying the full disclosure of the facts, the OCA's
18 suggestion is that this case seems to be one in which, given
19 the approach of the coming omnibus rate case, the Commission
20 could consider whether it could do so, provide a full
21 decision and full rights in this case on a somewhat more
22 expedited basis if it were able to avoid cross-examination
23 in oral hearings.

24 PRESIDING OFFICER OMAS: Thank you.

25 Is there anyone else? Mr. McKeever?

1 MR. MCKEEVER: Mr. Chairman, just one more
2 sentence because this opportunity doesn't come up too often.

3 United Parcel Service endorses the Postal
4 Service's approach that this subject is something that
5 should be taken up on a case by case basis, and we submit
6 that it's premature in this case to decide that issue at
7 this point.

8 PRESIDING OFFICER OMAS: Thank you.

9 COMMISSIONER GOLDWAY: I have a question.

10 PRESIDING OFFICER OMAS: Yes?

11 COMMISSIONER GOLDWAY: Mr. Gerarden, could you
12 provide the Commissioners with a proposed schedule that you
13 think would compare the time it would take giving people
14 adequate opportunities to submit documents and respond in
15 one case where there is a hearing and in one case when there
16 isn't so we can see what the parameters are for this option
17 that you are presenting?

18 MR. GERARDEN: Certainly. I think what you're
19 looking for would be a kind of proforma schedule --

20 COMMISSIONER GOLDWAY: In either option.

21 MR. GERARDEN: -- if there were oral hearings and
22 a similar schedule if there were not?

23 COMMISSIONER GOLDWAY: Yes. I'd appreciate seeing
24 that.

25 MR. GERARDEN: I can do that.

1 COMMISSIONER GOLDWAY: Thank you.

2 PRESIDING OFFICER OMAS: Is there anyone else?

3 (No response.)

4 PRESIDING OFFICER OMAS: I think it's clear from
5 what has been filed so far and from what has been said here
6 today that it would be premature to reach any decision
7 today. However, we will try to clarify whether and how
8 hearings will be held, along with other pending matters,
9 expeditiously.

10 That covers the issues I wanted to address. Now,
11 does any participant have a matter they wish to raise at
12 this point?

13 (No response.)

14 PRESIDING OFFICER OMAS: If there is nothing more,
15 my colleagues and I thank you for your participation here
16 today, and the prehearing conference is now adjourned.

17 Thank you.

18 (Whereupon, at 10:30 a.m. the prehearing
19 conference in the above-entitled matter was concluded.)

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REPORTER'S CERTIFICATE

DOCKET NO.: MC-2001-1

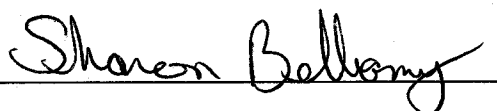
CASE TITLE: Experimental Presorted Priority Mail
Rate Categories

HEARING DATE: April 6, 2001

LOCATION: Washington, D.C.

I hereby certify that the proceedings and evidence are
contained fully and accurately on the tapes and notes
reported by me at the hearing in the above case before the
United States Postal Rate Commission

Date: April 6, 2001



Official Reporter

Heritage Reporting Corporation

Suite 600

1220 L Street, N. W.

Washington, D. C. 20005-4018

Heritage Reporting Corporation
(202) 628-4888